United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1350

B

P/S

TO BE ARGUED BY
JAMES E. EAGAN

UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 74-1350

UNITED STATE OF AMERICA,

Appellee,

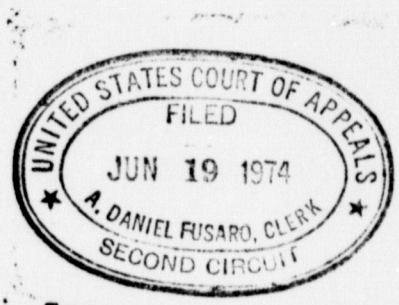
vs.

WILLIAM MICHAEL FARUOLO,

Appellant.

On Appeal from the United States District Court
For the Eastern District of New York

BRIEF FOR APPELLANT FARUOLO



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STATEMENT OF THE CASE

Defendant-Appellant, WILLIAM MICHAEL FARUOLO, appeals from a judgment of the United States District Court for the Eastern District of New York, entered on March 8, 1974, after a plea of guilty before Honorable Edward R. Neaher the Defendant-Appellant was convicted of conspiracy to receive and possess stolen property, in violation of 18 U.S.C. Sec. 371, & 659.

Appellant was sentenced to a probationary term of five years, with a special condition that Appellant seek business counseling under the supervision of the Probation Department.

Appellant, who was represented by private counsel in the District Court was assigned counsel for the purpose of this appeal pursuant to the Criminal Justice Act.

Statement Of Facts

The Appellant - Defendant, William Michael Faruolo, and seven other persons were charged with unlawfully receiving and having in their possession a quantity of packs and cartons of women's wearing apparel knowing the same to have been stolen in interstate commerce in violation of Title 18. U.S.C. Section 659 (1) and (2), and conspiracy to commit said crime in violation of Title 18 U.S.C. Sec. 351.

On August 14, 1972, F.B.I. agents seized a quantity of merchandise consisting of packs and cartons of women's wearing apparel from the residence of Defendant - Appellant, William Michael Faruolo, after having arrested the Defendant - Appellant and the other defendants in the immediate vicinity of the Faruolo residence.

A suppression hearing regarding the seized merchandise was held in the United States District Court, Eastern District of New York before the Honorable Edward R. Neaher on November 1st, November 2nd, and November 5th, 1973.

The motion to suppress was denied. Defendant - Appellant, William Michael Faruolo, pleaded guilty preserving an issue for appeal with the agreement of the Government and Court.

The pertinent facts to the within appeal occured at about 4:00 P.M. on April 14, 1972 when the F.B.I. agents in the surveillance team observed the other defendants unloading a truck in front of the home of Defendant - Appellant Faruolo.

(Numbers in parenthesis refer to stenographer's minutes of suppression hearing. If followed by "AP" same indicate page in appendix. Other references so indicated.)

When they finished and were in the process of leaving the F.B.I. agents closed in and arrested (47) everyone whom they had observed as participants in the unloading.

While the arrests were taking place in front of Faruolo's house, Agent Edwards proceeded to the rear of the house where he found Defendant - Appellant, Faruolo (161) and placed him under arrest. Upon placing Faruolo under arrest, Agent Edwards advised him of his rights under Miranda against Arizona, with the exception of a warning that he had a right to have counsel appointed for him if he could not afford counsel. (375).

Shortly after Faruolo's arrest, Agent Egan came into the back yard and asked Defendant - Appellant Faruolo for permission to search his house (375). Agent Egan also read a written consent to search Form to Defendant - Appellant, which he signed after thinking for a minute or two (376).

The subsequent search resulted in seizure of the merchandise which was the subject of the Defendant - Appellants motion to suppress.

UNITED STATES COURT OF APPEALS
For the Second Circuit X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against- Docket No. 74-1350

WILLIAM MICHAEL FARUOLO, et al.

Defendants-Appellants
X

ISSUES PRESENTED FOR REVIEW

1. Are Miranda warnings properly given when their is a failure to advise a subject under arrest that he has a right to have counsel appointed for him if he could not afford counsel?

2. Where a defendant has been placed under arrest are Miranda Warnings required before the arresting authorities may question defendant regarding a consent to search?

GROUNDS PRESENTED BY
OTHER APPELLANT

Several other points are being urged by the co-appellant, ANTHONY BERNARDEZ. His arguments will not be duplicated herein. Such omission is not to be deemed an abandonment thereof, and should this Court hold them to be meritorious and applicable to all parties, the status of this Appellant should naturally be comprehended within such determination.

POINT I

DEFENDANT-APPELLANT WAS NOT PROPERLY ADVISED OF HIS RIGHT AS REQUIRED BY MIRANDA v ARIZONA.

With respect to the Miranda warnings the findings of fact established by the Court below show that upon placing Defendant-Appellant under arrest, the arresting F.B.I. agent advised the Defendant-Appellant of his rights under Miranda against Arizona, 384 US 436, 86 S.Ct. 1622, 16 L. Ed. 2d 694 (1966), with the exception of a warning that he had a right to have counsel appointed for him if he could not afford counsel (375).

The Court additionally found that there was no evidence that Defendant-Appellant, FARUOLO at any time prior to this proceeding could not afford counsel of his choice (375).

The Court then went on to conclude (381)

> "The Court believes that FARUOLO having essentialy received his basic Miranda warnings, as well as specific Fourth Amendment warnings, received adequate warnings to uphold a consent otherwise voluntarily given".

It is Defendant-Appellant's contention that absent the advice that he had a right to have counsel appointed for him if he could not afford counsel, he did not under the facts and circumstances in the case at bar, receive the warnings to which he was entitled under Miranda v. Arizona (supra).

In rendering its decision as to the aspect of

compliance with Miranda the Court below notes (378)

> "There is some ambiguity in the decisions of this Circuit, whether the failure to warn a person of this right renders a confession inadmissable."

The Court relies in part upon the holding of this Court in United States v Carneglia, 468 F2nd, 1084 (Second Circuit) 1972, and the distinction of that case from United States v Fox, 403 F2nd, 97 (Second Circuit) 1968, and United States v. Chaplin, 435 F2nd, 320 (Second Circuit) 1970.

However the Court below's reliance upon U.S. v. Carneglia to the facts in the case at bar is totally unjustified for the following reasons:

> In Carneglia the Defendant was advised if he could not afford an attorney, why one would be appointed for him if and when he went to court;

In the case at bar there was no mention whatsoever that an attorney would be appointed for defendant-appellant at any stage of the proceeding.

In Carneglia the Court specifically used this as a basis for its distinguishing U.S. v. Fox and U.S. v Chaplin, At page 1091 the Court said:

> "...and in both Fox and Chaplin no mention was made whatever of court-appointed attorneys supplied at any point in the criminal process; here the agent specifically adverted to appointment of counsel if and when Inzerillo went to Court."

In the case at bar the finding of the Court below that (375)

> "Since there is no evidence that FARUOLO at any time prior to these proceedings could not afford counsel of his choice"

does not supply the missing aspect of the Miranda warnings because there is equally no finding that the Defendant-Appellant could afford an attorney.

As a matter of fact there is no evidence in the record whatsoever as to the financial condition of the defendant upon which the Court could make any finding regarding the financial condition of Defendant-Appellant, FARUOLO. This specific finding by the Court is tainted with the notion that Defendant-Appellant should have come forward with evidence to show that he could not afford counsel. The conclusion of the Court below that because the defendant had private counsel at the supression hearing he must have been able to afford counsel, and therefore need not have been advised of the right of Court appointed counsel is mere speculation, which would shift the burden of showing adequate warnings from the government to the Defendant-Appellant.

As to facts in evidence, if there be any to be considered, as to the financial condition of Defendant-Appellant it should be noted at the time of his arrest

the F.B.I. report on Defendant-Appellant, WILLIAM MICHAEL FARUOLO, attached to the Government's Bill of Particulars (appearing as item 16 in the record on appeal) clearly shows that Defendant-Appellant was unemployed at the time, with a wife and four children.

This is an additional distinguishing fact from United States v. Chaplin (supra) where the Court made a fact finding that defendant was steadily employed at wages varing from $60 to $100 per week, supported no one but himself, and had $1,800 in cash.

The only evidence in the record of the case at bar is the F.B.I. report showing Defendant-Appellant to be unemployed with a wife and four children. The observation by the Court that because Defendant-Appellant had private counsel and therefore was financially able to afford counsel is mere speculation which in the absence of inquiry as to the facts surrounding the retaining of counsel should be disregarded.

POINT II

WHERE A SUBJECT HAS BEEN PLACED UNDER ARREST MIRANDA WARNINGS ARE REQUIRED TO BE GIVEN PRIOR TO INQUISITION FOR PERMISSION TO CONDUCT A SEARCH.

Point I of the argument submitted on this appeal demonstrates that Defendant-Appellant was not properly advised of his rights as required by Miranda v Arizona.

It is the contention of Defendant-Appellant that

proper Miranda warnings must be given to a subject who has been placed under arrest, prior to inquisition for permission to conduct a search.

The Court below (379a) indicated that Defendant-Appellant has cited no cases holding that Miranda warnings must be given prior to a valid consent to search, and properly distinguishes United States v. Goosbey 419 F2d 918.

Because Defendant-Appellant can not find any cases which clearly stand for the principal of law presented to this Court, on Point II of the argument herein, and because Defendant-Appellant is confident that the Government will be equally unable to cite a case contrary to the submitted proposition that a consent to a search and resulting findings may be equated to a confession and governed by the standards enunciated in Miranda, we submit that such a determination should be made in favor of Defendant-Appellant considering the totality of the circumstances in the case at bar.

The facts in the case at bar show that agent Edwards placed Defendant-Appellant under arrest (375). There can be no argument that at that point in time, Defendant-Appellant was entitled to be apprised of his rights as enunciated in Miranda v Arizona (supra) prior to any questioning by the arresting authorities which would tend to elicit a admission or confession.

The words admission and confession are defined in

Webster's NEW Collegiate Dictionary, copyright 1964 by G.&C. Merriam Co. as follows:

> "ADMISSION 1. The action of admitting or the fact of being admitted or receivable..."
>
> "CONFESSION 1. Act of confessing;..."

The definition of the words conote action, with no distinction between oral or physical.

It is respectfully submitted that a confession or admission can manifest itself equally by either an oral declaration or physical action depending on the facts of a particular case.

In the case at bar it can fairly be said that after placing the Defendant-Appellant under arrest it would have been contrary to Miranda v Arizona (supra) for agent Edwards to ask Defendant-Appellant to tell him whether or not he had the hijacked goods in his house prior to giving the Defendant-Appellant his Miranda warnings. If agent Edwards had so inquired and had the Defendant-Appellant said "yes the hijacked goods are in my house" such an admission would have been inadmissable at trial.

Wherein then lies the difference in the case at bar where the Defendant-Appellant is asked to perform the physical act of signing a consent to search which results in the disclosure of the hijacked goods in the Defendant-Appellant's house.

CONCLUSION

Defendant-Appellant did not receive proper warnings as proscribed in Miranda v Arizona, and as a result thereof under the facts and circumstances in the case at bar could not sign a valid consent to search form. Accordingly the judgment of conviction in the Court below should be reversed.

Respectfully submited,

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UNITED STATES COURT OF APPEALS
For the Second Circuit

AFFIDAVIT OF SERVICE

Docket No. 1350/74

UNITED STATES OF AMERICA,

Appellee,

vs.

WILLIAM MICHAEL FARUOLO,

Appellant.

State of New York, County of New York ss.:
Gina Wolfman
being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at Staten Island, New York.

That on the 19th day of June 1974 deponent served Brief For Appellant Faruolo on Raymond J. Dearie, Esq. attorney for United States of America at:
U.S. Attorneys Office
225 Cadman Plaza East
Brooklyn, New York 11201
the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in-a post office-official depository under the exclusive care and custody of the United States post office department within New York State.

Sworn to me before, this
19th day of June 1974.

Mary R Eagan

MARY R. EAGAN
NOTARY PUBLIC, State of New York
No. 41-1062305
Qualified in Queens County
Commission Expires March 30, 1975

Gina Wolfman

Gina Wolfman

Received one copy of brief
from appellant Farnolo

William Epstein

June 19, 1974